

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONALD L. REINHART
Claimant

VS.

SUPERIOR INDUSTRIES INT'L
Respondent
Self-Insured

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Docket No. 180,932

ORDER

Claimant requests review of the Award of Administrative Law Judge John D. Clark entered in this proceeding on January 25, 1995. The Appeals Board heard oral argument in Pittsburg, Kansas, on April 28, 1995.

APPEARANCES

Claimant appeared by his attorney, Timothy A. Short of Pittsburg, Kansas. The respondent, a self-insured, appeared by its attorney, John I. O'Connor of Pittsburg, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge awarded claimant permanent partial general disability benefits based upon the functional impairment rating of five percent (5%). The claimant requested this review and contends he is entitled to benefits for a significant work disability. In addition, claimant contends the Administrative Law Judge lost all authority to decide this case when claimant filed a request to transfer the proceeding under the provisions of K.S.A. 44-523(c), and that the deposition of Gary Weimholt taken by respondent after expiration of its terminal date should not be included as part of the record for determination of the issues in this proceeding. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the finding of the Administrative Law Judge that claimant is entitled to benefits based upon a five percent (5%) functional impairment should be affirmed. The analysis of the Administrative Law Judge is persuasive and accurate, and is hereby adopted by the Appeals Board for this review.

(1) On May 11, 1993, the claimant injured his low back while lifting and inspecting an eighteen (18) pound wheel. Due to his injury, claimant was off work approximately ten (10) days when he returned to light duty. Several weeks after returning to work, claimant returned to his regular job as a process control technician where he remained until being terminated in December 1993 for allegedly abandoning his job.

Claimant's average weekly wage on the date of accident was \$360.06, excluding additional compensation items. Including additional compensation items, the average weekly wage was \$398.50.

During the approximate thirty (30) week period claimant worked for respondent following his accident, claimant earned approximately \$80.00 per week in overtime wages. Upon his initial return to work, claimant earned \$6.40 per hour straight time compared to \$6.65 per hour when he was terminated. Based upon this evidence, the Appeals Board finds claimant retained the ability to earn a comparable wage despite his work related injuries. In light of this finding, it is appropriate to invoke the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e which provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant is entitled to permanent partial general disability benefits based upon his functional impairment rating. The Appeals Board agrees with the Administrative Law Judge that the opinion of board certified orthopedic surgeon Robert Rawcliffe, Jr., M.D., is persuasive and that claimant has a five percent (5%) permanent impairment of function to the body as a whole due to his low back condition. The Appeals Board finds claimant sustained lumbar strain superimposed upon a preexisting condition of spondylolysis.

(2) Claimant contends the Administrative Law Judge lost the authority to decide this proceeding when claimant requested the Director transfer this case to an assistant director or special administrative law judge under the provisions of K.S.A. 44-523. The argument is without merit. Subsection (c) of the statute provides:

"When all parties have submitted the case to an administrative law judge for an award, the administrative law judge shall issue an award within 30 days. When the award is not entered in 30 days, any party to the action may notify the director that an award is not entered and the director shall assign the matter to an assistant director or to a special administrative law judge who shall enter an award forthwith based on the evidence in the record, or the director, on the director's own motion, may remove the case from the administrative law judge who has not entered an award within 30 days following submission by the party and assign it to an assistant director or to a special administrative law judge for immediate decision based on the evidence in the record."

A close reading of the statute indicates the Director is required to assign the proceeding to an assistant director or a special administrative law judge for a prompt decision. The statute implies the Director must perform some act to institute the assignment. Therefore, the filing of a notification of tardy decision or of a request for transfer does not act as an automatic or instantaneous transfer of the case from the administrative law judge to which it was originally assigned. Because the Director had not removed the proceeding from the Administrative Law Judge nor reassigned it before the Award was issued, the Administrative Law Judge retained jurisdiction over the proceeding and the authority to enter the Award.

(3) Because claimant is entitled to permanent partial disability benefits based upon functional impairment rather than work disability, the issues surrounding the deposition of labor market expert Gary Weimholt and its inclusion into the evidentiary record is rendered moot.

(4) Because claimant was terminated from his employment, the additional compensation items are to be included in the computation of his average weekly wage for the period following his termination on December 15, 1993. See K.S.A. 44-511. In this respect, the Award of the Administrative Law Judge should be modified. As indicated above, the average weekly wage including additional compensation items is \$398.50.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark entered in this proceeding on January 25, 1995, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ronald L. Reinhart, and against the respondent/self-insured, Superior Industries International, for an accidental injury which occurred on May 11, 1993, and based upon an average weekly wage of \$360.06 for the period through December 14, 1993. For the period following December 14, 1993, claimant's award is based upon the average weekly wage of \$398.50. Claimant is entitled to 2.29 weeks of temporary total disability compensation at the rate of \$240.05 per week or \$549.71, followed by 31.14 weeks of permanent partial disability benefits at the rate of

\$12.00 per week or \$373.68, followed by 381.57 weeks of permanent partial disability benefits at the rate of \$13.28 per week or \$5,067.25 for a 5% permanent partial general disability, making a total award of \$5,990.64.

As of June 16, 1995, there is due and owing claimant 2.29 weeks of temporary total disability compensation at the rate of \$240.05 per week or \$549.71, followed by 31.14 weeks of permanent partial disability compensation at the rate of \$12.00 per week in the sum of \$373.68, followed by 78.57 weeks of permanent partial disability compensation at the rate of \$13.28 per week in the sum of \$1,043.41, for a total of \$1,966.80 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$4,023.84 is to be paid for 303 weeks at the rate of \$13.28 per week, until fully paid or further order of the director.

Claimant is entitled future medical benefits upon proper application to the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be directly paid as follows:

CRS Court Reporting Service	
Deposition of Robert Rawcliffe, M.D.	Unknown
Delmont Reporting Service	
Stipulation Transcript	\$ 72.90
Deposition of Ronald Reinhart	\$375.00
TOTAL	\$447.90
Hostetler & Associates, Inc.	
Deposition of Roger Hood, M.D.	\$211.00
Deposition of Edward Prostic, M.D.	\$182.70
TOTAL	\$393.70
Patricia K. Smith	
Deposition of Gary Weimholt	\$110.20
Deposition of Linda Scherz	\$ 97.20
Deposition of M. Ellen Nichols, M.D.	\$ 68.25
Deposition of Jerry Hardin	\$153.45
TOTAL	\$429.10

IT IS SO ORDERED.

Dated this ____ day of June, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy A. Short, Pittsburg, Kansas
John I. O'Conner, Pittsburg, Kansas
John D. Clark, Administrative Law Judge
George Gomez, Director